Poke Food (M) Sdn Bhd & Anor v Fooditive Holdings Sdn Bhd & Ors

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO BA-22NCVC-410–09 OF 2019
JULIE LACK JC
15 JUNE 2020

Civil Procedure — Injunction — Interim injunction — Plaintiffs granted ex parte interim injunction — Defendants filed application to set aside ex parte interim injunction — Whether there were serious issues to be tried — Whether damages were an adequate remedy — Whether there was a balance of convenience — Rules of Court 2012 O 29 r 1

On 23 October 2019, the plaintiffs were granted an ex parte interim injunction via encl 7 pursuant to O 29 r 1 of the Rules of Court 2012 and s 51 of the Specific Relief Act 1950. It was an interlocutory injunction that the defendants and its directors and shareholders, spouses and immediate family of its directors and shareholders and employees, whether directly or indirectly by itself or themselves or through agents, was prohibited pending the disposal of the suit from carrying on, procuring, causing, enabling, authorising and permitting any other business identical or similar to the 'The Fish Bowl' business. The defendants filed the application in encl 22 to set aside the ex parte interim injunction order. The plaintiff did not actively pursue the application for an ad interim order nor they did actively pursued an early date for the hearing of the inter parte application. The applications were set down for hearing on 18 February 2020, four months after the interim injunction was granted. It was the plaintiffs' contention that the second defendant who was a member of the Board of Directors of the plaintiffs as well as a shareholder of the first plaintiff was duty bound to ensure that the business of 'The Fish Bowl' be undertaken in a proper, honest and bona fide manner in the best interest of the plaintiffs. The plaintiffs contended that the third defendant as the plaintiff's general manager was entrusted by the plaintiffs not to conduct or carry out any activities that were detrimental to the interest of the plaintiffs. The plaintiffs alleged that that the second and third defendants, without the knowledge, approval and consent of the plaintiffs discreetly and deviously opened the similar competing restaurant known as 'Burnt'. The plaintiffs contended that the defendants set up a new restaurant trading under the name and style of 'Kubis & Kale' in order to overcome the intricacies of the present suit against the plaintiffs. It was the contention of the plaintiffs that the second and third defendants had jointly conspired with the fourth and fifth defendant in opening the 'Kubis & Kale' restaurant and had imitated the plaintiffs' distinct style of menu and presentation of food but the defendants undercut the price

in competition with 'The Fish Bowl'. It was further contended that damages were sufficient as a remedy as the plaintiff's clear and real remedy was in damages as evident from the plaintiffs' own pleadings. The issues for the court's determination were: (a) whether there were serious issues to be tried; (b) whether damages were an adequate remedy; and (c) whether there was a balance of convenience.

Held, dismissing the plaintiffs' application in encl 7 and allowing the defendants' application in encl 22, with costs:

(1) The court agreed with the defendants' contention that the plaintiffs' application for injunction against the third defendant was without basis as she was a mere employee and hence, was not vested with any fiduciary duties to the plaintiffs that required her to desist from working for any company or any perceived rival company for that matter. Apart from asserting that the third defendant owed a fiduciary duty to the plaintiffs the plaintiffs did not produce any documentary proof of their grievances against her for the court to determine on this issue. It therefore remained a bare allegation (see paras 36–38)

(2) The issues raised were questions of fact which had to be proven at the trial through documentary evidence and testimonies of relevant witnesses. The questions could not be decided by the court summarily. Certainly it went without saying that whether or not the plaintiffs were able to make out the claims at the trial when all the evidence would be before the court, with full opportunity to cross examine all the relevant witnesses must be something that remained to be seen. The court was satisfied that there were serious issues to be tried especially as regarded the plaintiff's claims against the second defendant on whether there was breach of duties pursuant to s 210 of the Companies Act 2016; the misappropriation or unauthorised withdrawal of company funds; the alleged fraud or negligent misrepresentation and concealment of having another competing business (see paras 49).

(3) There was no difficulty for the plaintiffs to quantify and identify the loss and damage suffered at the hands of all the defendants. Due to the ascertainable and quantified pecuniary compensation sought, it was of the court view that the damages were an adequate remedy. It was now left only for a full trial to be carried out in order to prove all the claims for damages said to be suffered by the plaintiffs (see para 53).

(4) The plaintiffs had not satisfactorily shown to the court the manner in which the fourth and fifth defendants were in any way connected to the plaintiffs' business. Apart from alleging that the fourth, fifth and sixth defendants were co-conspirators by establishing and operating identical competing restaurants at the peril of the plaintiffs' The Fish Bowl business, there was no elaboration of how they became co-conspirators

against the plaintiffs. There was no evidence proffered to support the allegation of the conspiracy theory alleged against the forth to sixth defendants. The court agreed with the defendant's contention that the plaintiffs could seek the proper remedies against the second defendant but not injured the fourth to sixth defendants and the 'Kubis & Kale' restaurant. An injunction against the defendants from operating and running the 'Kubis & Kale' restaurant was harsh and tantamount to punishing the fourth to sixth defendants without giving a chance for the matter to be ventilated in a vive voca trial (see paras 57 & 60).

[Bahasa Malaysia summary

Pada 23 Oktober 2019, plaintif-plaintif telah diberikan injunksi interim ex parte melalui lampiran 7 menurut A 29 k 1 Kaedah-Kaedah Mahkamah 2012 dan s 51 Akta Relif Spesifik 1950. Ia adalah injunksi interlokutori bahawa defendan dan pengarah dan pemegang-pemegang saham, pasangan dan keluarga terdekat pengarah dan pemegang saham dan pekerjany, sama ada secara langsung atau tidak langsung dengan sendirinya atau mereka sendiri atau melalui ejen, telah dilarang sementara menunggu selesai saman tersebut daripada menjalankan, memperoleh, menyebabkan, membolehkan, memberi kuasa dan membenarkan apa-apa perniagaan lain yang sama atau serupa dengan perniagaaan 'The Fish Bowl'. Defendan-defendan telah memfailkan permohonan dalam lampiran 22 untuk mengetepikan perintah injunksi interim ex parte itu. Plaintif tidak secara aktif memohon permohonan untuk perintah ad interim mahu pun secara aktif memohon tarikh awal untuk perbicaraan permohonan inter parte. Permohonan-permohonan tersebut telah ditetapkan untuk perbicaraan pada 18 Februari 2020, empat bulan selepas injunksi interim diberikan. Ia adalah hujah plaintif bahawa defendan kedua yang merupakan ahli Lembaga Pengarah plaintif dan juga pemegang saham plaintif pertama terikat dengan kewajipan untuk memastikan bahawa perniagaan 'The Fish Bowl' dilaksanakan dengan wajar, jujur dan dengan secara niat baik demi kepentingan terbaik plaintif. Plaintif menegaskan bahawa defendan ketiga sebagai pengurus besar plaintif telah diberikan kepercayaan oleh plaintif untuk tidak menjalankan atau melaksanakan apa-apa aktiviti yang menjejaskan kepentingan plaintif. Plaintif mengatakan bahawa defendan-defendan kedua dan ketiga, tanpa pengetahuan, kebenaran dan persetujuan plaintif secara diam-diam dan licik telah membuka restoran yang sama bersaing dikenali sebagai 'Burnt'. Plaintif berhujah bahawa defendan telah menubuhkan restoran baru yang berniaga di bawahh nama dan gaya 'Kubis & Kale' bagi tujuan mengatasi kerumitan saman ini terhadap plaintif. Ia adalah hujah plaintif bahawa defendan-defendan kedua dan ketiga telah bersesama berkonspirasi dengan defendan-defendna keempat dan kelima dalam pembukaan restoran 'Kubis & Kale' dan telah meniru gaya dan menu tersendiri plaintif dan persembahan makanan tetapi defendan telah mengurangkan harga dalam persaingan dengan 'The Fish Bowl'. Selanjutnya ia dihujahkan bahawa ganti rugi adalah remedi yang mencukupi kerana remedi

A yang jelas dan sebenar plaintif adalah ganti rugi sebagaimana terbukti daripada rayuan plaintif sendiri. Isu-isu untuk ditentukan mahkamah adalah: (a) sama ada terdapat isu-isu serius untuk dibicarakan; (b) sama ada ganti rugi adalah remedi yang mencukupi; dan (c) sama ada terdapat imbangan kesesuaian.

B **Diputuskan**, menolak permohonan plaintif dalam lampiran 7 dan membenarkan permohonan defendan dalam lampiran 22, dengan kos:

(1) Mahkamah bersetuju dengan hujah defendan bahawa permohonan plaintif untuk injunksi terhadap defendan ketiga adalah tanpa asas kerana dia hanya seorang pekerja dan justeru, tidak diberikan apa-apa kewajipan fidusiari kepada plainti yang menghendakinya berhenti daripada bekerja untuk mana-mana syarikat atau mana-mana syarikat yang dianggap saingan dalam hal itu. Selain daripada menegaskan bahawa defendan ketiga mempunyai kewajipan fidusiari terhadap plaintif, plaintif tidak mengemukakan apa-apa bukti dokumentar berhubung ketidakpuasan hati mereka terhadapnya untuk ditentukan oleh mahkamah berhubung isu ini. Oleh itu ia hanya dakwaan kosong (lihat perenggan 36–38).

(2) Isu-isu yang ditimbulkan adalah persoalan-persoalan fakta untuk dibuktikan semasa perbicaraan melalui keterangan dokumentar dan keterangan saksi-saksi berkaitan. Persoalan-persoalan tersebut tidak boleh diputuskan oleh mahkamah terus. Sudah tentu tanpa perlu dikatakan bahawa sama ada atau tidak plaintif dapat membuat tuntutan semasa perbicaraan apabila semua keterangan di hadapan mahkamah, dengan peluang penuh untuk memeriksa balas semua saksi yang berkaitan adalah sesuatu yang masih perlu dilihat. Mahkamah berpuas hati bahawa terdapat isu serius yang perlu dibicarakan terutamanya berkaitan tuntutan plaintif terhadap defendan kedua sama ada terdapat pelanggaran kewajipan menurut s 210 Akta Syarikat 2016; penyelewengan atau pengeluaran dana syarikat tanpa kebenaran; dakwaan penipuan atau salah nyata yang cuai dan penyembunyian mempunyai perniagaan saingan yang lain (lihat perenggan 49).

(3) Tiada kesukaran bagi plaintif untuk mengukur dan mengenal pasti kerugian dan kerosakan yang dialami oleh semua defendan. Akibat daripada pampasan kewangan yang boleh dipastikan dan mengikut kuantiti yang diminta, adalah pada pandangan mahkamah bahawa ganti rugi itu adalah remedi yang mencukupi. Hanya yang tinggal kini adalah untuk satu perbicaraan penuh dijalankan bagi membuktikan semua tuntutan ganti rugi yang dikatakan telah dialami oleh plaintif-plaintif (lihat perenggan 53).

(4) Plaintif tidak menunjukkan dengan memuaskan kepada mahkamah cara bagaimana defendan-defendan keempat dan kelima dalam apa cara mempunyai kaitan dengan perniagaan plaintif-plaintif. Selain daripada

mengatakana bahawa defendan-defendan keempat, kelim dan keenam berkonspirasi bersama dengan menubuhkan dan menjalankan restoran-restoran bersaing yang serupa dengan risiko kepada perniagaan The Fish Bowl plaintif-plaintif, tidah ada terdapat apa-apa perincian bagaimana mereka boleh berkonspirasi bersama terhadap plaintif-plaintif. Tiada keterangan telah dikemukakan untuk menyokong dakwaan teori konspirasi yang didakwa terhadap defendan keempat hingga keenam. Mahkamah bersetuju dengan hujah defendan bahawa plaintif boleh mendapatkan remedi yang sewajarnya terhadap defendan kedua tanpa menjejas defendan keempat hingga keenam dan restoran 'Kubis & Kale'. Injunksi terhadap defendan-defendan daripada mengendalikan dan menjalankan restoran 'Kubis & Kale' adalah keras dan sama dengan menghukum defendan keempat hingga keenam tanpa memberi peluang untuk perkara itu dibicarakan dalam perbicaraan vive voca (lihat perenggan 57 & 60).]

Cases referred to

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors [1995] 1 MLJ 241; [1995] 1 CLJ 461, SC (refd)
American Cyanamid Co v Ethicon Ltd [1975] AC 396, HL (refd)
Datuk Syed Kechik bin Syed Mohamed v Datuk Yeh Pao Tzu & Ors [1977] 1 MLJ 56; [1975] 1 LNS 24 (refd)
Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193; [1995] 1 CLJ 293, CA (refd)
Ranson v Customer Systems PLC [2012] IRLR 769, CA (refd)

Legislation referred to

Companies Act 2016 s 210
Rules of Court 2012 O 29, O 29 r 1, 1(2B)
Specific Relief Act 1950 s 51

Alvin John (Walston Wai and Sharan Chandrasekeran with him) (Alvin John & Partners) for the plaintiff.
Tay Hong Huat (Wai Chong Khuan and Law Ching Min with him) (Tay & Helen Wong) for the defendant.

Julie Lack JC:

INTRODUCTION

[1] This judgment concerns two interlocutory applications which were heard simultaneously by this court on 18 February 2020:

(a) encl 7 is the plaintiff's inter parte application for an injunction against the defendants; and

(b) encl 22 is the defendants' application to set aside the ex parte interim order dated 23 October 2019 (ex parte interim order).

[2] At the conclusion of the hearing this court dismissed encl 7 and allowed order in terms of encl 22. The following are the grounds of judgment of this court.

SALIENT BACKGROUND FACTS OF THE CASE

[3] On 23 October 2019 the plaintiffs were granted an ex parte interim injunction via encl 7 pursuant to O 29 r 1 of the Rules of Court 2012 and s 51 of the Specific Relief Act 1950 allowing the following interim orders:

(a) an interlocutory injunction that the defendants and its directors and shareholders, spouses and immediate family of its directors and shareholders, and employees, whether directly or indirectly by itself or themselves or through agents, be forthwith prohibited pending the disposal of this suit from carrying on, procuring, causing, enabling, authorising and/or permitting any other business identical or similar to the 'The Fish Bowl' business including but not limited to:

(i) any commercial venture that serves 'Hawaiian-style poke bowl' menu consisting of various fresh ingredients thrown into a bowl which fundamentally contains ingredients that consists of a base, sides, chunks of protein, toppings, specialty sauces and add-ons, further to itemise white rice, brown rice, greens, shoyu salmon, cucumber, pineapples, corns, onions, Furikake (Japanese seasoning), green onions, seaweed flakes, fish roe, gar-gar sauce (specialty sauces), spicy sriracha salmon, cherry tomatoes, chili flakes, fried shallots, baby-racha sauce (specialty sauces), garlic shrimp, mangoes, edamame, carrots, garlic chips, sesame seeds, tofu, walnuts, pumpkin seeds, falz seeds, avocado, parmesan crisps, herby lime sauce (specialty sauces). Miso salmon, seaweed salad, lime aioli sauce (specialty sauces).

(b) an interlocutory injunction that the defendants and its directors, shareholders, spouses and immediate family of its directors and shareholders, and employees whether directly or indirectly by itself or themselves or through agents, be forthwith prohibited pending disposal of this suit howsoever from passing off or howsoever infringing the plaintiffs' goodwill and reputation in the 'The Fish Bowl' business including but not limited to the reproduction and use in trade of a deceptively or confusingly similar business system, trade dress and/or get up;

(c) an interlocutory injunction that the defendants and its directors, shareholders, spouses and immediate family of its directors and

shareholders, and employees whether directly or indirectly by itself or themselves or through agents, be forthwith prohibited pending disposal of this suit from continuing with the restaurant trading under the name and style known as BURNT;

(d) an interlocutory janction that the defendants and its directors, 'shareholders, spouses and immediate family of its directors and shareholders, and employees whether directly or indirectly by itself or themselves or through agents, be forthwith prohibited pending disposal ofthis suit from continuing with the restaurant trading under the name and style known as 'Kubis & Kale'; and

(e) an interlocutory injunction that the defendants and its directors, shareholders, spouses and immediate family of its directors and shareholders, and employees whether directly or indirectly by itself or themselves or through agents, be forthwith prohibited pending disposal of this suit from setting up any other restaurants, trading under whatsoever name and style which sells identical and/or similar products to the plaintiffs' The Fish Bowl Restaurant.

[4] The inter parte application for the interlocutory injunction was initially fixed for hearing on 13 November 2019 at 9 am. However it was not heard on 13 November 2019 and therefore the interim injunction order automatically lapsed after 21 days (see O 29 r 1(2B) of the ROC 2012).

[5] In the meantime the defendants filed their application in encl 22 on 11 November 2019 to set aside the ex parte interim injunction order made on 23 October 2019.

[6] It is pertinent to note that the plaintiffs did not actively pursue an application for an ad interim order nor did they actively pursue an early date for the hearing of the inter partes application and therefore the hearing of both these applications were finally set down for hearing on 18 February 2020, four months after the interim injunction was granted.

FACTS OF THE CASE AND PARTIES

[7] The first plaintiff was incorporated on 1 August 2016 and initially operated a restaurant trading under the name and style of 'The Fish Bowl'. The first plaintiff describes itself as a restaurant which specialised in serving the 'Hawaiian style poke bowl' menu. Its first outlet was located at Bandar Sunway in Subang Jaya. Its directors consisted of Goh Wea Hong (fifth defendant by counterclaim), Ching Jun. Hoang (sixth defendant by counterclaim), Lim Khai Keat (second defendant) and Cher Tu Hoang. At the material time the

A second defendant was a member of the Board of Directors of the plaintiffs and a shareholder of the first plaintiff.

[8] Chin Pei Lee Pearly, the third defendant was employed as the first plaintiff's operations manager commencing on 12 September 2016.

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[9] Subsequently Lim Ted Hung and Ng Shwu Huey (third and fourth defendant in the counterclaim) joined the first plaintiff and their role was mainly to invest and provide capital. A joint venture agreement dated 30 July 2017 was entered into by the parties and the second plaintiff was incorporated for this purpose. The shareholders of the second plaintiff consisted of Lim Ted Hing, Ng Shwu Huey and the first plaintiff.

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[10] The business expanded and more Poke Food outlets were opened all over the Klang valley. At this particular point of time the second defendant was a member of the Board of Directors for the first and second plaintiffs and a shareholder of the first plaintiff. The plaintiffs claim that the second defendant was in charge of the business operations, day to day management and finance of the Fish Bowl restaurant. The third defendant was appointed as the general manager of the second plaintiff.

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[11] On 14 June 2018 Burnt (M) Sdn Bhd was set up by the second, third and fourth defendants. It opened a restaurant on 16 September 2018 and was located on a floor above The Fish Bowl in the same building at Bandar Sunway.

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[12] On 19 March 2019 the first defendant, Fooditive Holdings Sdn Bhd was incorporated and proceeded to take over the business of the BURNT restaurant outlet. The first defendant is owned by the fourth and fifth defendants.

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[13] The plaintiffs claim that the second and third defendants concealed their relationship and engagements in 'Burnt' from the plaintiffs' directors and shareholders. The plaintiff further claims that they only became aware of the involvement of the second and third defendants in Burnt in June 2019. The plaintiffs averred that they had no knowledge of the involvement of the second and third defendants prior to that. When the plaintiffs became aware of the situation they instructed their solicitors to serve a cease and desist letter dated 8 July 2019 to the defendants. There was a reply by letter dated 23 July 2019 from the defendant's solicitors.

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[14] The plaintiffs filed this civil suit against the first to third defendants on 20 September 2019 and filed an application for an ex parte interim injunction on 11 October 2019. On 22 October 2019 the plaintiffs added the fourth to sixth defendants as parties to the suit. The next day on 23 October 2019 the

plaintiffs obtained an ex parte order against the first, second and third defendants. The terms of the ex parte interim injunction has been laid out in the earlier part of this judgment.

[15] Meanwhile prior to these events on the judicial calendar, the first, second and third defendants closed down the Burnt restaurant and outlet on 23 September 2019. This is exactly one month before the ex parte interim injunction was obtained.

[16] Where does the sixth defendant stand in this matter? The sixth defendant was incorporated on 11 July 2019 and is wholly owned by the fourth and fifth defendants. The sixth defendant runs the restaurant known as Kubis & Kale. This restaurant was opened for business on 27 September 2019 but closed its doors for business on 26 October 2019 as a result of the ex parte interim injunction obtained by the plaintiffs. Incidentally the second and third defendants were engaged by the sixth defendant to run the Kubis & Kale outlet. They do not however have any shares in the company.

[17] It would be pertinent to add that the ex parte interim injunction named only the first to third defendants as parties and they are bound by the said order. The first to third defendants are named in the endorsement or penal notice of the order. The fourth to sixth defendants are not named in the order nor were they served with the ex parte interim injunction. It bears mention that the fourth to sixth defendants are not named as parties in the notice of application encl 7.

[18] As both encls 7 and 22 were heard together and concern the same subject matter ie that the plaintiffs want the injunction to continue until final disposal of the hearing and the defendant on the other hand want an order to set aside the ex parte interim injunction, this court will combine the grounds of decision into this one judgment as the reasons for the decisions are the same and apply for both applications.

THE PLAINTIFFS' SUBMISSIONS

[19] In summary it is the contention of the plaintiffs that the second defendant who is a member of the Board of Directors of the plaintiffs as well as a shareholder of the first plaintiff was duty bound to ensure that the business of 'The Fish Bowl' be undertaken in a proper, honest and bona fide manner in the best interest of the plaintiffs. The plaintiffs contended that the third defendant being the plaintiffs' general manager was entrusted by the plaintiffs not to conduct or carry out any activities that were detrimental to the interest of the plaintiffs.

[20] The plaintiffs alleged that the second and third defendants, without the knowledge, approval and consent of the plaintiffs discreetly and deviously opened the similar competing restaurant known as 'Burnt'. The plaintiffs claim that the restaurant 'Burnt' served similar food and copied and duplicated 'The Fish Bowl'. The plaintiffs allege that the second and third defendants were aided and abetted by the other defendants in their spurious activities. The plaintiffs contended that the 'Burnt' restaurant operated its business in the same building in an outlet just above 'The Fish Bowl' and this they say was done under their very noses with the sole intention to unlawfully hijack the plaintiffs' business and eventually cause the destruction of the plaintiffs' goodwill, reputation and customer base. Not only that the plaintiffs stated that the second defendant poached their employees causing these employees to leave 'The Fish Bowl' and work in 'Burnt' instead.

[21] The plaintiffs averred that the second and third defendants abused their senior positions in the plaintiffs by fraudulently siphoning monies from the plaintiffs' bank accounts. They also claimed that the second defendant abused 'his position as managing director without their knowledge and approval' had unilaterally terminated the first plaintiff's tenancy agreement at the Sunway outlet on 1 April 2019. This caused the plaintiffs to be detrimentally and irrevocably affected due to the loss of customers and a share of the market.

[22] It is also the contention of the plaintiffs that the defendants have represented to the. public at large that 'Burnt' Restaurant replaced the plaintiffs' 'The Fish Bowl' business at the Sunway outlet and then ceased operations to circumvent in anticipation of the suit to be brought against them. The plaintiffs contended the defendants then cleverly set up a new restaurant trading under the name and style of 'Kubis & Kale'. in order to overcome the intricacies of the present suit against them. It is the contention of the plaintiffs that the second and third defendants have jointly conspired with the fourth and fifth defendant in opening the 'Kubis & Kale' restaurant and have imitated the plaintiffs' distinct style of menu and presentation of food but they undercut the price in competition with 'The Fish Bowl'.

[23] The plaintiffs claim that the actions of the defendants to establish the 'Kubis & Kale' restaurant in the same vicinity as the plaintiffs was with the sole intention of misleading the regular customers of the plaintiffs into thinking that 'Kubis & Kale' have replaced The Fish Bowl' restaurant. They claim that this is an act of passing off the plaintiffs' goodwill and reputation. This has caused the plaintiff to suffer irreparable harm.

[24] Hence it is the contention of the plaintiffs that the setting up of the competing restaurants by the defendants had culminated in various breaches of the law namely:

(a) breach of fiduciary duties;

(b) breach of director's duties under the Companies Act 2016;

(c) breach of confidence and employment duties;

(d) fraud;

(e) tort of fraudulent and/or negligent misrepresentation and concealment;

(f) act of passing off;

(g) unjust enrichment;

(h) breach of trust; and

(i) tort of unlawful interference with business.

[25] Thus the plaintiffs contended that the unconscionable conduct and the mala fide intention of the defendants were the main reasons why the plaintiffs applied for the ex parte interim injunction in the first place and the reason why the plaintiffs want the court to allow their application for an interlocutory injunction be set in place until the full and final disposal of this suit.

THE DEFENDANTS' SUBMISSIONS

[26] In applying to set aside the ex parte order for injunction as well as to oppose the plaintiffs' inter parte application for an interim injunction the defendants raised several issues:

(a) there was inordinate and unexplained delay on the part of the plaintiffs in seeking injunctive reliefs;

(b) there was no true urgency shown on the part of the plaintiffs to apply for the ex parte injunction;

(c) the plaintiffs did not come to court with clean hands;

(d) there was no full and frank disclosure in the application filed by the plaintiffs;

(e) there was suppression of material facts;

(f) plaintiffs perpetrated factual misrepresentations; and

(g) there was non-compliance of O 29 of the ROC 2012.

EVALUATION AND FINDINGS OF THE COURT

[27] In determining the two applications for decision before this court, it is the duty of the court in such a situation to consider the pertinent factors as adumbrated in the oft quoted case of *American Cyanamid Co v Ethicon*

Ltd [1975] AC 396 (cited with approval in the Court of Appeal case of *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193; [1995] 1 CLJ 293). In summary the factors to be considered are as follows:

(a) whether there is a bona fide serious issue to be tried;

(b) whether damages are sufficient to compensate the plaintiff if it were to succeed at the trial;

(c) the court will look at the balance of hardship: in whose favour the balance of convenience lies;

(d) the plaintiff must make a full and frank disclosure of all material facts; and

(e) that there are special circumstances in the plaintiff's favour or no special circumstances in favour of the defendants.

[28] With the legal principles as stated In *American Cyanamid* in mind, I now turn back to consider the applications in encls 7 and 22.

Whether there are serious issues to be tried?

[29] A study of the facts of the case will reveal that there appears to be serious disputes as to the versions presented by both sides. There are allegations and counter allegations of misappropriation of funds, poaching of employees and hence I am left in no doubt that the matter must be sorted out in a full trial with vive voce evidence.

[30] If one were to peruse the prayers sought in the application for injunction it will reveal that the plaintiffs are seeking injunctions to prohibit the defendants and their agents from carrying on, procuring, causing, enabling, authorising and/or permitting any other business identical or similar to the 'The Fish Bowl' business and it included any menu which served 'Hawaiian' style poke bowl consisting of various ingredients and food items amongst others. Therefore in order to be allowed to perpetuate the Injunction it would certainly be the duty of the plaintiffs to establish their rights to be protected with regard to the 'The Fish Bowl' restaurant business and the type or style of food served and sold by the plaintiffs' restaurants.

[31] The plaintiffs in their submissions have set the record straight by stating that they 'do not profess or claim to have proprietorship or exclusivity over Poke Food or Poke Bowl'. They have stated in their submissions that they 'have never at any material time claimed proprietorship or exclusivity to the Poke Food: and that their claim 'has never been that Poke Food is exclusive to the plaintiff and no one else'. Therefore the court takes cognisance of the admission

by the plaintiffs that they have no proprietary or exclusive rights over the Poke Food or any of the myriad varieties of Hawaiian style Poke-Bowl. Relying on these submissions it would not be wrong to hold that this goes against their prayers claimed in paras (1), (2), (4), (5), (6) and (9) of the plaintiff's ex parte application for injunction. What can be gleaned from the prayers sought in encl 7 would effectively be that the plaintiffs are attempting to prohibit the defendants from selling Poke Food in 'Burnt', 'Kubis & Kale' or any other business they wished to set up thereafter.

[32] It is the contention of the defendants that this is unconscionable and unreasonable as the plaintiffs were in effect seeking an interlocutory injunction to stop the defendants from selling Poke Food without expressly using the term. I find that the defendants are not without some right when they complained that the plaintiffs were attempting through their application to unreasonably stop the defendants from selling Poke Food in not so many words. The plaintiffs have specifically listed what the defendants cannot sell ie that business which connotes:

(a) any commercial venture that serves 'Hawaiian-style poke bowl menu consisting of various fresh ingredients thrown into a bowl which fundamentally contains ingredients that consists of a base, sides, chunks of protein, toppings, specialty sauces and add-ons, further to itemise white rice, brown rice, green, shoyu salmon, cucumber, pineapples, corns, onions, Furikake (Japanese seasoning), green onions, seaweed flakes, fish roe, gar-gar sauce (specialty sauces), spicy sriracha salmon, cherry tomatoes chili flakes, fried shallots, baby-rachoa sauce (specialty sauce), garlic shrimp, mangoes, edamame, carrots, garlic chips, sesame seeds tofu, walnuts, pumpkin seeds, flax seeds, avocado, parmesan crisps, herby lime sauce (specialty sauce), miso salmon, seaweed salad, lime aioli sauce (specialty sauces)'.

[33] From the above comprehensive list of ingredients it certainly seems to show that the plaintiffs want to effectively prevent the defendants from selling Poke style food and this is not tenable. It cannot therefore be true that the plaintiffs are not claiming proprietorship or exclusivity to the Poke Food or that their claim has never been that Poke Food is exclusive to the plaintiff and no one else. The prayer sought above will in effect give the plaintiffs an exclusive dominance over the defendants and the defendants would not be allowed to set up any business venture to sell any food that contained the ingredients listed by the plaintiffs in their prayer. The totality of the evidence through the affidavits appears to support this stand. However I must emphatically state that I am not deciding on the actual merits of the suit itself. That matter must be determined at the trial. At this stage all that is needed is to consider whether there are serious issues to be tried or not.

[34] In their application for the ex parte injunction, the plaintiffs had cited the grounds for the order as being the fact that the defendants had commenced a competing business with the plaintiffs. They contended that the defendants had launched a competing business known as 'Burnt' which served Hawaiian-style Poke Bowl menu.

[35] However a study of the chronology of events would show that the 'Burnt' restaurant had already closed down permanently on 23 September 2019. The plaintiffs obtained the ex parte injunction on 23 October 2019. At the time when the plaintiffs appeared before the learned High Court judge for the hearing of the ex parte application there was no longer any issue of any business competition between the plaintiffs and the defendants respective restaurants. I tend to agree with the contention of defence counsel when he stated that there was no longer any 'live issue' concerning restraining the Burnt restaurant. Yet despite knowing that the Burnt restaurant had closed down the plaintiffs went ahead and obtained the ex parte order. In all probability if the learnt judge had been appraised of this material fact, then he would probably have been hesitant in allowing the application. At this point in time there would seem to be no necessity to perpetuate the injunction on the ground that the need to restrain the defendants from continuing with the restaurant trading under the name and style of 'Burnt' is no longer relevant. The basis for that prayer in the application is now redundant. This would have put a whole different perspective on the outcome of the application for the ex parte application had the court been appraised of these intervening situation that occurred after the filing of the notice of application in encl 7.

[36] With regard to the purported breach of fiduciary duties by the second and third defendants, first and foremost on the part of the third defendant, I note the significance of the fact that the third defendant was merely an employee of the plaintiffs. She was not a director nor was she a shareholder. It is further noted that the third defendant worked as operations manager of the Sunway outlet under the first plaintiff until 10 June 2019.

[37] I find myself in agreement with the defendants' contention that the plaintiffs' application for injunction against the third defendant is without basis as she was a mere employee and hence she was not vested with any fiduciary duties to the plaintiffs that required her to desist from working for any company or any perceived rival company for that matter. Reference is made to the case of *Ranson v Customer Systems PLC* [2012] IRLR 769 where it was held that:

> whereas a company director will stand in a fiduciary relationship to the company, an employee will not, merely by reason of his role as an employee, assume fiduciary obligations to his employer ... the starling point for determining whether an

employee owes fiduciary duties to an employer and if so, what duties, is the contract of employment. A

[38] Apart from asserting that the third defendant owed a fiduciary duty to the plaintiffs the plaintiffs did not produce any documentary proof of their grievances against her for the court to determine on this issue. It therefore remains a bare allegation. B

[39] Turning to the claim of breach of fiduciary duties against the second defendant, the plaintiffs contended that the second defendant blatantly and under their noses set up and operated 'Burnt' restaurant on 16 September 2018 and then 'Kubis & Kale' restaurant on 27 September 2019 despite being a director of the first and second plaintiff. C

[40] From the exhibits produced through the various affidavits it cannot be denied that the plaintiffs had on 7 June 2019 served a notice to the second defendant to remove him as the managing partner of the first plaintiff. They followed that up with a letter giving notice to remove him as a director of the first plaintiff on 30 August 2019. The second defendant was then removed as managing partner on 21 June 2019 and as director of the first plaintiff on 30 September 2019. The second defendant also received notices to remove him as director of the second plaintiff and on 22 August 2019 the second defendant was effectively removed as managing director of the second plaintiff. With the removal of the plaintiff as directors of the two companies, the plaintiffs had effectively cut off the second defendant from having any role in the business as of those dates. It would appear that the plaintiffs no longer had any basis therefore to obtain the ex parte injunction for the reason that the second defendant had breached his fiduciary duties. Based on the records it is clear that when the ex parte injunction order was obtained on 23 October 2019, the second defendant was no longer a director of the plaintiffs. I find this to be a material fact and an important factor in considering whether the interlocutory injunction order should be extended until the suit is adjudicated upon. D E F G

[41] I take note of the defendants' contention that the plaintiffs cannot rely on this issue to claim that the second defendant still continued to owe a fiduciary duty to the plaintiffs. H

[42] Further, the second defendant is not a shareholder or a director of the sixth defendant which runs the 'Kubis & Kale' restaurant. According to the SSM search the fourth and fifth defendants are the directors of the sixth defendant and owners of the restaurant. The substance of the plaintiffs' application is their averment that the defendants had colluded and connived in setting up the 'Kubis & Kale' restaurant. This has yet to be substantiated and can only be proved at the trial. As for now the contemporaneous documents I

tendered show that the second defendant is not a director nor a shareholder in the company. It would therefore not be appropriate or fair to prevent the 'Kubis & Kale' restaurant from carrying on with the business.

[43] It is the view of this court that the plaintiffs have no valid reason to apply for an injunction to restrain the fourth, fifth and sixth defendants. The 'Kubis & Kale' restaurant was opened on 27 September 2019. The second defendant admits that he was offered a job as a chef in the restaurant. From a perusal of the facts, it is clear that the second defendant had been served with notices to remove him as a director in the plaintiffs' companies from as early as July 2019. He was removed as director of the second plaintiff on 22 August 2019. He was removed as director of the first plaintiff on 30 September 2019.

[44] I tend to agree with the defendants when they contended that even if there was a breach it is only as against the first plaintiff and that too was only for a period of four day ie from 27 September 2019 to 30 September 2019. I would agree with their contention that this did not warrant injunctive prohibition. I find that the plaintiffs have the alternative remedy to claim for damages to compensate them for any loss or damage suffered as a result of the operation of the 'Kubis & Kale' restaurant in that four day period if the claim for breach of fiduciary duty is proven at the trial later.

[45] I am of the view it is unreasonable to prevent the second defendant from being employed as a consultant by the fourth and fifth defendants. The plaintiff does not have exclusive rights over Poke style of food industry and hence their bid to restrain him from being involved in that industry is unsustainable. The second defendant has stated in his affidavit In reply that he is a trained chef and that the idea of founding the poke style of food and bringing it into fruition had come from his idea and creativity. This has not been actively disputed by the plaintiffs. Therefore the second defendant should not be restrained from continuing to do what he does best. Furthermore the plaintiffs do not have patent rights over that style of food and have quite explicitly stated that they are not claiming proprietary and exclusive rights over the Poke style of food.

[46] Having considered the matter as stated above, I must say that although I agree that there are serious issues to be tried between the opposing claims of both the plaintiffs and the defendants I am not prepared here to hold that the plaintiffs are entitled to obtain an interlocutory injunction to restrain the defendants from continuing with working and running the 'Kubis & Kale' restaurant.

[47] I am satisfied that by 22 August 2019 the second plaintiff had totally and effectively removed the second defendant from the company and this was

followed by his removal by the first plaintiff on 30 September 2019.

[48] By the time the present suit was filed on 20 September 2019, the first plaintiff no longer allowed the second defendant on the premises or play any role in the plaintiffs' company. I would however note that there was a four day interval between 27 September 2019 to 30 September 2019 but that would have made very little difference (on the face of it) because the second defendant was by then no longer allowed to take any active role in the running of the plaintiffs' company. I agree with the defendants' suggestion that the four day interval can be compensated through damages if any are quantified.

[49] In the final analysis I would accept that the issues raised here are questions of facts which have to be proven at the trial through documentary evidence and testimonies of relevant witnesses. These questions cannot be decided by the court summarily. Certainly it goes without saying that whether or not the plaintiffs are able to make out their claims at the trial when all the evidence will be before the court, with full opportunity to cross-examine all the relevant witnesses must be something that remains to be seen. In the meantime however, based on the facts of the case and from the chronology of events I am satisfied there are serious issues to be tried, especially as regards the plaintiffs' claims against the second defendant ie whether he had breached his duties pursuant to s 210 of the Companies Act 2016; the misappropriation/unauthorised withdrawal of company funds; the alleged fraud, fraudulent/negligent misrepresentation and or concealment of having another competing business.

[50] If, on the other hand, I am wrong in my finding that there are serious issues to be tried then I turn now to consider the next question following the *American Cyanamid* principles ie whether damages are a sufficient remedy.

Are damages an adequate remedy?

[51] It is settled law that an interim injunction should not be granted where it can be ascertained that damages are an adequate remedy (see *Datuk Syed Kechik bin Syed Mohamed v Datuk Yeh Pao Tzu & Ors* [1977] 1 MLJ 56; [1975] 1 LNS 24). It was contended for the defendants that damages are sufficient as a remedy as the plaintiffs' clear and real remedy is in damages as evident from the plaintiffs' own pleading. In the amended writ and statement of claim the first plaintiff has quantified and particularised their losses. In the prayer in para 22 of the amended writ and para 88(22) of the amended statement of claim the first plaintiff has quantified damages to be in the range of RM909,152.95 with specific breakdowns of the amount claimed. For ease of reference the quantum of damages claimed are as follows:

(a) loss of business profits (June 2019–15 September 2019) RM336,278.54;

(b) unauthorised bank transactions (cash cheque) amounting to RM18,100);

(c) penalty incurred from failing to comply with statutory requirements amounting to RM16,455.88;

(d) loss of business profits due to opening of 'Burnt' for the year 2018 = RM32,895.99;

(e) loss of business profits due to opening of 'Burnt' for the year 2019 = RM155,622.54; and

(f) cost of opening a new outlet to replace the loss of Sunway outlet amounting to RM349,800.

[52] The defendants contended that the same reasoning applies to the second plaintiff. A reference to the amended writ and amended statement of claim would show that the second plaintiff has quantified their losses to the tune of RM775,567.72. The details are particularised in acute detail in the statement of claim ie in para 23 of the amended writ and para 88(23) of the amended statement of claim. These include among others claims for loss of the total value of fixed assets, loss of business profits, unauthorised online transactions, and redundancy payments as well as loss of business profits due to the competing business at 'Burnt'.

[53] There is no difficulty for the plaintiffs to quantify and identify the loss and damage suffered by them at the hands of all the defendants. Due to the ascertainable and quantified pecuniary compensation sought, this court is of the view that damages are an adequate remedy.

[54] It is now left only for a full trial to be carried out in order to proof all of the above claims for damages said to be suffered by the plaintiffs.

[55] With regard to the plaintiffs' claim against the fourth to sixth defendants, it is noted that they were added into the suit as parties on the eve of the hearing of the application for the ex parte injunction. These are part of the claims by the plaintiffs against the fourth to sixth defendants:

(7) a declaration that the defendants had acted in breach of trust by engaging in a competing business called 'Kubis & Kale';

(8) a declaration that the defendants acted in conflict of interest by reason of their involvement and engagement in the business known as 'Kubis & Kale; and

(11) a permanent mandatory injunction against the defendants whether acting by itself, its directors, officers, employees, servants or agents or any of them however be restrained by continuing with the restaurant trading under the name and style known as 'Kubis & Kale'.

[56] The SSM search reveals that the fourth and fifth defendants were never associated with the plaintiffs' businesses. They were neither directors nor shareholders of the first and second plaintiffs. The SSM shows that the fourth and fifth defendants are shareholders and directors of the sixth defendant. The 'Kubis & Kale' restaurant is owned and operated by the sixth defendant. The third defendant is its general manager. According to the affidavit in reply filed by the second defendant, he was hired by the fourth and fifth defendants to act as their advisor for the restaurant after 'Burnt' closed down.

[57] The plaintiffs have not satisfactorily shown to this court the manner in which the fourth and fifth defendants are in any way connected to the plaintiffs' business. Apart from alleging that the fourth, fifth and sixth defendants are co-conspirators by establishing and operating identical competing restaurants at the peril of the plaintiffs' The Fish Bowl business there is no elaboration of how they became co-conspirators against the plaintiffs. There is no evidence proffered to support their allegation of the conspiracy theory they alleged against the fourth to sixth defendants. From the affidavits filed, it cannot be denied that the plaintiffs dispute is very much against the second defendant rather than all the other defendants. The defendants have contended that that it would be unjust and unconscionable to allow an injunction against the fourth to sixth defendants to operate and manage the 'Kubis & Kale' restaurant when the only grievance the plaintiffs have against them is due to their decision to take the second defendant on board to act as their advisor to manage and run the restaurant. I agree with the defendants' contention that the plaintiffs' can seek their proper remedies against the second defendant but not injunct the fourth to sixth defendants and the 'Kubis & Kale' restaurant.

[58] As to the prayer of conflict of interest alleged against the fourth to sixth defendants by opening the 'Kubis & Kale' restaurant, there is no elaboration as to how it impacted the plaintiffs since the fourth to sixth defendants have no 'history' of interactions with the plaintiffs.

[59] As to the prayer of passing off against the fourth to sixth defendants, I must state that there should be nothing to stop them from selling Poke Food in their restaurant as the plaintiffs have not shown that they alone have exclusive rights to sell Poke Food in the food industry.

[60] I tend to agree that an injunction against the defendants from operating and running the 'Kubis & Kale' restaurant is harsh and tantamount to punishing the fourth to sixth defendants without giving a chance for the matter to be ventilated in a vive voca trial.

Balance of convenience

[61] If on the other hand I am found to be wrong and that there is doubt that damages are an adequate remedy, then I will go on here to consider the next question following the *American Cyanamid* principles namely where the balance of convenience lies.

[62] An interim injunction is a discretionary remedy. In the case of *Keet Gerald Francis* the court held that:

> ... all that matters that guide the court of equity in determining where the justice of the case lies are compendiously called the balance of convenience and we have, earlier in this judgement made reference to some of those matters ...

[63] Having considered the chronology of events and the peculiar facts and circumstances of this case, I am decidedly of the view that the balance of convenience lay on the side of refusing the application for the interim injunction order. This court takes cognisance of the fact that there has been undue delay on the part of the plaintiffs. Of particular importance are highlighted below.

[64] The plaintiffs did not take steps to take any action quickly after the 'Burnt' restaurant was opened for business on 16 September 2018. There is affidavit evidence adduced to show that one of the plaintiffs' directors named Goh WH knew that the second and third defendants were setting up the restaurant. The restaurant was in close proximity to the plaintiffs' restaurant and the plaintiffs did not complain that it was identical in concept to their restaurant. Almost a year later only did the plaintiffs' instruct their solicitors to issue the cease and desist letter on 8 July 2019. Even after the said cease and desist letter was served on the defendants the plaintiffs did not make haste to sue the defendants. They did not do anything at all for another two months. The plaintiffs only initiated their legal suit against the first to third defendants on 20 September 2019. The application for interlocutory injunction was filed on 11 October 2019. There is no reasonable explanation offered as to why the plaintiffs took almost 13 months to act on the matter. I find there is considerable delay in taking action on the part of the plaintiff.

[65] In the Supreme Court case of *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241; [1995] 1 CLJ 461 the court held that the essence of an application for an interlocutory injunction is that it should be made with promptitude and the court will not grant the injunction if the plaintiff is guilty of unreasonable delay.

[66] To compound matters the plaintiff allowed the ex parte injunction to lapse after it was obtained on 23 October 2019. The application to hear the matter inter partes was only heard in February 2020. The plaintiffs did not take any steps to apply for the inter parte application to be revived. Hence there was no valid injunction in force after 13 November 2019.

[67] On 5 December 2019 when the matter came before me, the plaintiffs did not make any application to the court for an ad interim injunction. There was a lapse of six months from November 2019 until April 2020 when the decisions pursuant to encls 7 and 22 were delivered by this court. It is the view of this court that the plaintiffs have been tardy in pursuing their rights and have allowed the interim injunction to lapse without making any effort to extend it. It would therefore be reasonable to conclude that the matter was now no longer an urgency to the plaintiffs and that the reasons for applying for the ex parte injunction in the first place no longer applied.

[68] It is therefore the decision of this court the balance of convenience tilts in favour of the defendants, there is no necessity for an injunction to be granted. The plaintiffs did not actively pursue the matter from November 2019 until February 2020 when these two applications were heard. It implied that the plaintiffs did not consider it of urgency and importance to obtain the order. More importantly it tends to bring on the inference that they did not suffer any harm or inconvenience after the injunction lapsed.

[69] Therefore the court is of the view that there is no necessity to allow the injunction to be perpetuated until after the trial is disposed off as the plaintiffs have not faced any hardship and have not demonstrated how they were hampered in any way after the ex parte order lapsed in November 2019.

CONCLUSION

[70] An interlocutory injunction is a temporary and discretionary remedy. Having given due consideration to the submissions of the parties, having evaluated the evidence and materials before me, it bears repetition that this court was not concerned with the chances of success or failure of the parties in proving their civil suit at the forthcoming trial but rather what it had to do in the interim to protect the right of the parties coming before it. In the context of the case presently before me, I have come to the considered view that there is no pressing need for the plaintiffs to be granted an interlocutory injunction pending the trial of the case. The reasons have been laid out in the judgment above. I therefore dismiss the plaintiffs' application in encl 7 with costs. I find the defendants have been successful based on their submissions in persuading me that the application in encl 22 should be allowed with costs. I therefore order accordingly.

The plaintiffs' application in encl 7 dismissed; and the defendants' application in encl 22 allowed with costs.

Reported by Mohd Kamarul Anwar